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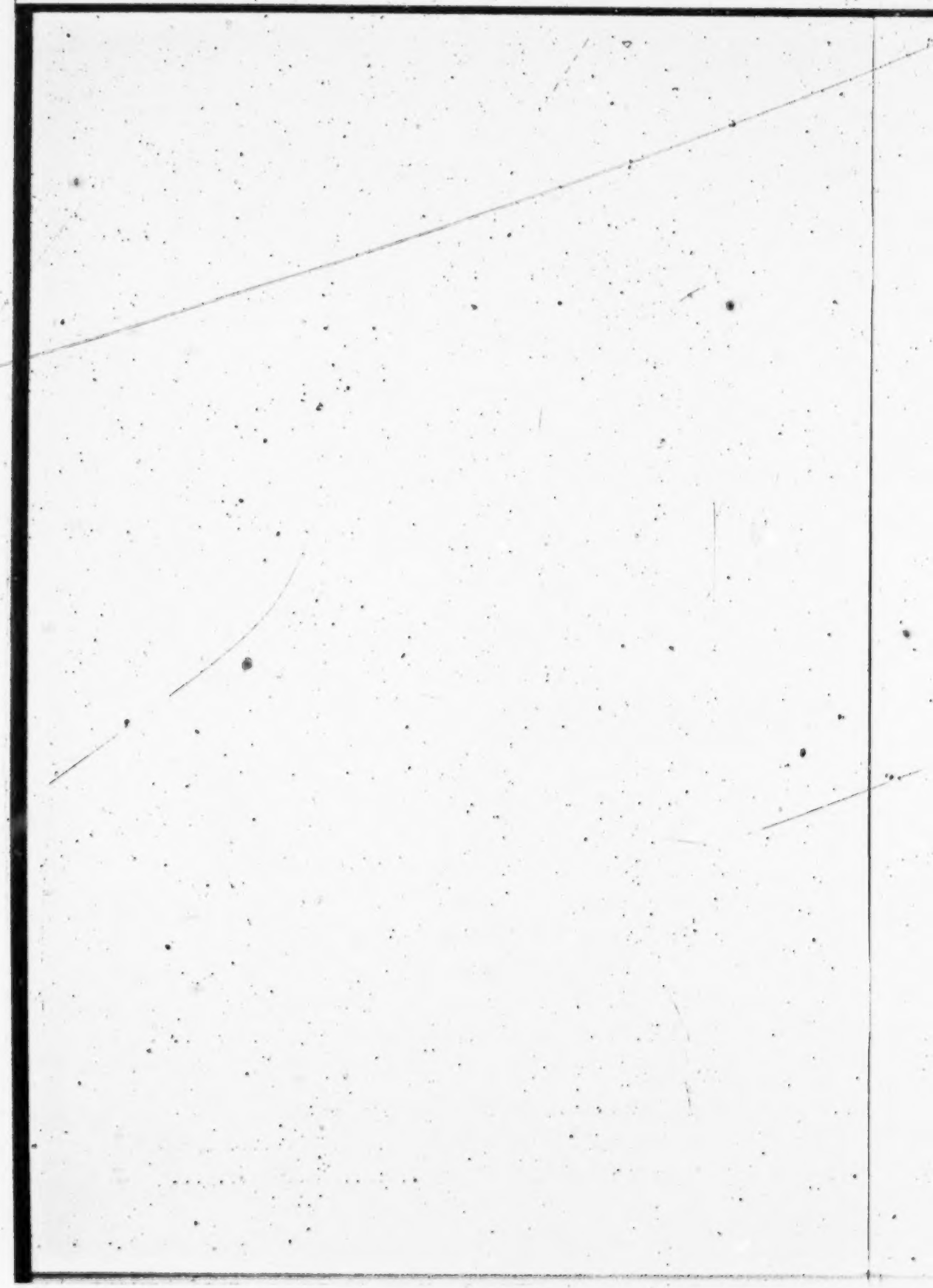
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STATUTE:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1093

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*

On Appeal from the United States District Court for the Northern District of Illinois

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, The Pennsylvania Railroad Company, Appellee, moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court[1] dismissing Appellants' complaint brought to set aside an order of the Interstate Commerce Commission.[2] The Commission's order which is declaratory in form found that Pennsylvania's plan to

[1] *Order of Railway Conductors and Brakemen v. United States*, 263 F. Supp. 650, decided November 30, 1966, and set forth at pp. i to xvii of the appendix to the Jurisdictional Statement.

[2] *Pooling of Railroad Earnings and Service, Pullman Co.*, 322 I.C.C. 100 (1964), set forth at pp. xx to xxiv of the appendix to the Jurisdictional Statement.

withdraw *pro tanto* from a railroad pooling arrangement for sleeping car operations would be consistent with and fully contemplated by the terms of the pooling as previously approved by the Commission, pursuant to Section 5(1) of the Interstate Commerce Act, in *Pooling of Railroad Earnings and Service, Pullman Co.*, 268 I.C.C. 473 (1947) and 276 I.C.C. 5 (1949). The district court concluded that the challenged finding by the Commission is "in accord with applicable law and . . . supported by substantial evidence of record." Its opinion noted:

> "The record before this court establishes that from the outset it was the design and intent that railroad members of the pooling arrangement should have the right to withdraw therefrom partially—that is, to withdraw from Pullman the performance of specified services and to perform those services itself." (263 F. Supp. 650, 654)

The record referred to by the Court below included not only the Commission proceedings which began in 1946, but also the antitrust case of *United States* v. *Pullman Company*, 50 F. Supp. 123 (1943) 53 F. Supp. 908 (1944), 64 F. Supp. 108 (1946), affirmed by an equally divided Court at 330 U.S. 806, rehearing denied, 331 U.S. 865 (1947).

In 1940 the United States initiated an antitrust proceeding in the District Court for the Eastern District of Pennsylvania against Pullman Incorporated and its subsidiaries, Pullman Standard Car Manufacturing Company and The Pullman Company. That court concluded that an unlawful monopoly existed in the business of manufacturing sleeping cars and of servicing and maintaining sleeping cars. It ordered the parent company to divest itself of either the manufacturing subsidiary or the service subsidiary, and ultimately approved sale of the latter (The Pullman Company) to the sleeping car railroads.

Since the court regarded those railroads as the principal victims of the monopoly involved, it was at pains to assure them maximum flexibility in future dealings with Pullman and to prevent Pullman from retaining any anti-competitive powers over the sleeping car business. The desired flexibility was to be achieved largely by assuring for the future that each railroad would have the right to withdraw wholly or partially from any contract with Pullman, as to which the court acted as follows:

1. In 50 F. Supp. 123 at page 137, it stated that its decree would be framed so as to assure "the right of any railroad which wishes to operate all or a portion of its own sleeping car business so to do," and to achieve "the elimination of exclusive dealing contracts between the Pullman Company and the railroads."

2. In its unreported judgment entered May 8, 1944, the court adopted orders requiring Pullman to offer so-called "partial operation" to the railroads and prohibiting Pullman from having or enforcing any exclusive right clause in future contracts which would require railroads to "deal only with Pullman in the matter of furnishing, servicing, or furnishing and servicing, sleeping cars."

3. In 64 F. Supp. 108 at page 112, the court stated that the unlawful monopoly could not recur with Pullman under railroad ownership because the continuing orders of the court, while allowing a railroad to "use exclusively the services of Pullman", would also provide that the railroad could "do part of that service itself . . . and ask Pullman to do the rest."

These actions by the antitrust court in the *Pullman* case were all before the Commission when the sleeping car railroads in 1946 applied for specific approval under Section 5(1) of a pooling of railroad earnings and service in

sleeping car operations through the instrumentality of Pullman. In addition, however, the right of a railroad at any time to take over and perform itself either the servicing of sleeping cars or the maintenance of sleeping cars was made expressly a part of the pooling arrangement both in the initial and in all subsequent proceedings before the Commission.

A Memorandum Agreement of October 18, 1945, among the applicant railroads set forth the basic terms of the proposed pool. It expressly reserved to each railroad member of the pool the right to "perform its own service or maintenance, or service and maintenance." It also provided that Pullman could be required to maintain sleeping cars for a railroad "whether or not leased to or serviced by The Pullman Company"—which is a precise description of what Pennsylvania has requested Pullman to do. In the Commission order here on appeal, the Memorandum Agreement of 1945 is referred to as "the original pooling agreement approved by this Commission." (322 I.C.C. 100)

In its 1949 proceeding on the sleeping car pool, reported at 276 I.C.C. 5, the Commission approved a revision of the agreement and a Uniform Service Contract to govern the respective rights and duties of each railroad and Pullman. That Contract again expressly required Pullman at the request of any railroad "to furnish a partial form of sleeping car service," and provided that Pullman would have no exclusive right either to furnish cars or to service cars. (322 I.C.C. 100)

Exercising its right thus accorded by the contract to request a partial form of service from Pullman, Pennsylvania notified Pullman in 1962 that on its local sleeping car lines Pullman would thereafter furnish and maintain the cars while Pennsylvania itself would service them. Appellant ORC&B obtained an injunction against this arrangement pending a determination by the Commission in *Brogan* v. *Pennsylvania Railroad Company*, 211 F. Supp.

881 (1962). This forced Pennsylvania to petition the Commission for a declaratory order. The order here on appeal was issued pursuant to that petition.

Although conductors employed by Pullman are complete strangers to the pooling agreements and arrangements as such, the right of Pennsylvania to withdraw as it seeks to do has thus been litigated by Appellants for the purpose of protecting the interests of such conductors. In December, 1963, Pennsylvania entered into an agreement with Appellant ORC&B which provides severance allowances or other protective payments to Pullman conductors who lose their jobs as a result of this withdrawal from the sleeping car pool. This agreement would be applicable to the proposed arrangement involved in this appeal.

The finding of the Commission sustained by the court below is to the effect that Pennsylvania is clearly entitled to exercise its rights under the approved pooling arrangement and that no application for specific approval of its request is required by Section 5(1) of the Act.

ARGUMENT

The decision below is plainly correct and this appeal presents no question warranting plenary review by this Court.

I. Appellants' efforts to delay and to deny Pennsylvania's right to withdraw partially from the Pullman pool are ultimately founded on semantics rather than substance. They insist that partial withdrawal by Pennsylvania will change, alter and amend the approved pooling arrangement, and must therefore be specifically approved by the Commission upon application and hearing under Section 5(1) of the Act. Admittedly a revision of an approved pooling arrangement requires Commission approval (*Pooling of Railroad Earnings and Service, Pullman Co.*, 306 I.C.C. 138, 140), but Appellants ignore the plain fact that

the type of *pro tanto* withdrawal sought by Pennsylvania has always been a part of the arrangement as consistently approved by the Commission. Thus, what Pennsylvania seeks to do is not a change or revision of the authorized pooling in any legally significant sense.

II. The Appellants attack the Commission order under review on the ground that they were denied a "hearing." This contention ignores the fact that the order is interpretive in character and does not constitute a grant of approval under Section 5(1) for the partial withdrawal by Pennsylvania from the pool. Thus, the order rests upon the extensive record made throughout the pooling case since 1946 and there was no need for an evidentiary hearing on Pennsylvania's petition.

III. Appellants or their predecessors in interest participated in the anti-trust case against Pullman and in the original Commission proceedings on the pooling here involved. They contended then against the right of any railroad to withdraw from the Pullman arrangement, presented all of the arguments they do now, but failed to persuade the court or the Commission to their point of view. In response to the Union's requests for job security, the antitrust court merely preserved "the rights of the employes of the Pullman Company under existing contracts and practices." *Pullman, supra,* 64 F. Supp. 108, 114 (1946). The Commission likewise found that it could not impose a restriction on the right of withdrawal from the pool "for the purpose of protecting the employment rights of Pullman employees who might be affected" (268 I.C.C. 473, 492). Thus the basic question presented on this appeal was presented and decided upwards of 20 years ago, without further action by Appellants.

IV. Repeated assertions by Appellants, that the Commission and the railroads have always given assurances that no Pullman conductors would be affected by railroad

withdrawals from the pool, are without any support in the record. The only assurance given by the railroads, and recognized by the Commission, was that Pullman would continue to be bound by its labor agreements and practices after its stock was acquired by the carriers (268 I.C.C. 473, 491). Furthermore, the care exercised by the antitrust court in the *Pullman* case and later by the Commission throughout the pooling proceedings, to assure each railroad at all times the unrestricted right to withdraw in whole or in part from any contract with Pullman, is plainly irreconcilable with the guarantee of employment security to Pullman employes which Appellants contend was given. Moreover, as previously stated, Pennsylvania has since agreed to make specified payments to Pullman conductors who lose their jobs through the proposed arrangement.

V. A pooling arrangement is inherently anti-competitive in nature, and antitrust statutes condone such arrangements only under special circumstances and, as in Section 5(1) of the Act, with specific regulatory supervision. Such special handling, however, applies only to the initiation of a pool. It has no place in the reverse situation, namely, when a member of the pooling group seeks to withdraw in whole or in part. Here antitrust policy is entirely different. It seeks to preserve and encourage the right of withdrawal or, as it is sometimes called, the right of independent action.[1] What Appellants seek here would plainly frustrate such policy. If, as Appellants contend, Pennsylvania must obtain the specific approval of the Commission under Section 5(1) of the Act before effecting

[1] Congress has expressly articulated this policy in subsection (6) of Section 5a of the Interstate Commerce Act, 49 U.S.C. 5a, in according railroad parties to rate conference agreements, approved by the Commission, "the free and unrestrained right to take independent action."

a partial withdrawal, the required procedures could completely nullify this exercise of the right of independent action. Section 5(1) requires the assent of all railroad participants to any new or revised pooling arrangement. The failure of one railroad in the sleeping car pool to give such consent—for any reason or no reason—would require denial of Pennsylvania's application. If the contentions of Appellants were sustained, each member of the anti-competitive pooling arrangement would hold an absolute veto over the exercise of the right by any other member to partially withdraw from it. That result would, accordingly, frustrate a basic antitrust policy in anti-competitive arrangements such as the sleeping car pool.

CONCLUSION

Since this appeal presents no issue of such substance as to require further argument, the judgment of the court below should be affirmed by the granting of this motion.

Respectfully submitted,

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PROOF OF SERVICE

I, David L. Wilson, Attorney for Appellee, The Pennsylvania Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of April, 1967, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellants, copies to their attorneys, Harry Wilmarth, Esq., 1120 Merchants National Bank Building, Cedar Rapids, Iowa, and Burke Williamson, Esq., 29 South LaSalle Street, Chicago, Illinois.

2. On the Appellee, United States of America, copies to the Honorable Ramsey Clark, Attorney General of the United States, Department of Justice, Washington, D. C., the Honorable Thurgood Marshall, Solicitor General, Department of Justice, Washington, D. C., the Honorable Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C., and Edward V. Hanrahan, Esq., United States Attorney, 219 South Dearborn Street, Chicago, Illinois.

3. On the Appellee, Interstate Commerce Commission, copies to the Honorable Robert W. Ginnane, its General Counsel, and Mrs. Betty Jo Christian, Esq., its Attorney.

4. On the Appellee, The Pullman Company, copies to its attorneys, Martin J. Rock, Esq., 165 North Canal Street, Chicago, Illinois, and Howard P. Robinson, Esq., 11 South LaSalle Street, Chicago, Illinois.

DAVID L. WILSON